

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeen G. Kelly.

Entergy Services, Inc.

Docket No. ER03-811-002

ORDER ON REHEARING

(Issued March 25, 2005)

1. On January 21, 2005, Entergy Services, Inc. (Entergy) requested rehearing of the Commission's order in *Entergy Services, Inc.* (Entergy Order).<sup>1</sup> In that order, the Commission approved an initial decision<sup>2</sup> that allowed Occidental Chemical Corporation (Occidental) to execute Entergy Louisiana, Inc.'s (Entergy Louisiana)<sup>3</sup> most recent *pro forma* interconnection and operating agreement (IA) in place of, and with the same effective date as, a previously filed and accepted IA. In its rehearing request, Entergy asks the Commission to ignore basic contract construction and overturn the Initial Decision based on Entergy's claimed intent at the time of contract formation. The Commission rejects Entergy's analysis and denies its rehearing request. This order benefits the public by ensuring that Entergy Louisiana complies with the terms of its interconnection agreements.

**Background**

2. The Commission described the facts of this case and the Initial Decision in the Entergy Order, so we will not recite the complete history of those proceedings here, but will briefly summarize the relevant events.

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<sup>1</sup> *Entergy Services, Inc.*, 109 FERC ¶ 61,342 (2004) (Entergy Order).

<sup>2</sup> *Entergy Services, Inc.*, 107 FERC ¶ 63,054 (2004) (Initial Decision).

<sup>3</sup> "Entergy is a service company affiliate of the Entergy Operating Companies, which include Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc. ("Entergy Louisiana"), Entergy Mississippi, Inc., and Entergy New Orleans, Inc. Entergy acts as the Entergy Operating Companies' agent with respect to the execution and administration of certain contracts and in proceedings before the Commission. Entergy Louisiana is the Entergy affiliate party to the Interconnection and Operating Agreement ("IOA") at issue in this proceeding." Brief on Exceptions of Entergy Services, Inc., July 22, 2004, at 1.

3. The Commission accepted Entergy Louisiana's proposed *pro forma* IA, subject to modification, on May 18, 2000.<sup>4</sup> On May 26, 2000, Entergy filed an unexecuted IA (the Original Taft IA) to interconnect Occidental's 778 MW cogeneration Taft facility to Entergy Louisiana's transmission system.

4. The controversy here revolves around the Original Taft IA section 23.8 (reopener provision). Under this provision, in the event that Entergy files a *pro forma* IA which is accepted for filing by the Commission, Occidental may execute such Commission-approved form in lieu of the Entergy-Occidental Taft agreement.

5. Several months after filing the Original Taft IA, Entergy Louisiana filed an interconnection agreement concerning Occidental's Convent facility (Original Convent IA). The Original Convent IA was based upon Entergy Louisiana's originally proposed *pro forma* IA, which had been accepted for filing by the Commission and did not include the reopener provision. Occidental protested both the Original Taft IA and the Original Convent IA. The Commission consolidated the proceedings and set these matters for hearing.<sup>5</sup>

6. The Commission subsequently approved a Settlement Agreement, filed by Entergy and Occidental. The Settlement Convent IA does not contain the reopener provision; however, the Settlement Taft IA does include this provision. The Settlement Agreement also contains "Principles for Waterford Breaker Upgrade Cost Allocation" (the Breaker Principles) which cover Required System Upgrades that Occidental would pay to interconnect the Taft facility.

7. The Initial Decision held that the reopener provision allows Occidental to execute Entergy's most recently FERC-accepted *pro forma* IA, in place of the interconnection agreement in the Settlement Taft IA. The Commission issued an order approving the Initial Decision in this proceeding without modification.

## **Discussion**

8. Entergy argues that the Entergy Order was arbitrary and capricious because it agreed with the ALJ's Initial Decision that: (1) the reopener provision trumps the Breaker Principles; (2) Occidental's interpretation of the reopener provision is consistent with the Settlement Agreement and Breaker Principles; (3) the reopener provision was intended to be effective following the execution of the Settlement Agreement and the Settlement Taft IA; (4) extrinsic evidence was properly considered and evaluated;

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<sup>4</sup> *Entergy Services, Inc.*, 91 FERC ¶ 61,149 (2000).

<sup>5</sup> Occidental's contested several aspects of the Original Taft IA and the Original Convent IA, including payment for system upgrades.

(5) a “very strong inference” of intent could be drawn from the submittal to the Commission of the Original Taft IA eight days after the Commission’s issuance of our order accepting the *pro forma* IA for filing; (6) probative evidence of intent provided by the Settlement Convent IA between Occidental and Entergy was properly evaluated; and, (7) that the three ways in which Entergy described the initially-accepted *pro forma* IA are different versions of the agreement.

9. None of the arguments raised here by Entergy compel the Commission to change our assessment of the ALJ’s Initial Decision. Entergy raises the same or similar arguments as found in its Brief on Exceptions.<sup>6</sup> The Commission rejects Entergy’s arguments for the reasons discussed below.

**A. Relationship Between Settlement Agreement and Reopener Provision**

**1. Administrative Law Judge Decision**

10. The ALJ found no conflict between the Settlement Agreement and the Breaker Principles and the reopener provision because the Breaker Principles do not survive an election under the reopener provision. The ALJ held that, upon Occidental’s election of the reopener provision, the Settlement Agreement provision which concludes that the Breaker Principles control in the event of a conflict is no longer in effect. He held that the reopener provision “is effective and creates a right on the part of Occidental to turn away from the Settlement Agreement, the Settlement Taft IOA, and the Principles, in favor of Entergy’s *Pro Forma* IOA that has a wholly different approach to a number of terms and conditions of interconnection and operation.”<sup>7</sup>

11. The ALJ held that the initial responsibility for the Breaker Upgrades was assigned to Occidental, but its receipt of transmission credits is consistent with this initial assignment.<sup>8</sup> The ALJ found that the Taft Required System Upgrades seem to be eligible for transmission credits under *Duke Energy Hinds, LLC, et al. v. Entergy Servs. Inc., et al.*, 102 FERC ¶ 61,068 at P 24 (2003), because they are not truly assignment facilities (i.e., interconnection facilities). Appendix A lists interconnection facilities that cannot receive credits, but does not include the Breaker Upgrades. Instead, Appendix B, which enumerates System Upgrades, lists the Breaker Upgrades.

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<sup>6</sup> Brief on Exceptions of Entergy Services, Inc., July 22, 2004.

<sup>7</sup> Initial Decision at P 56.

<sup>8</sup> *Id.* at P 61.

## 2. Entergy's Arguments

12. Entergy asserts that the ALJ erred in not finding that the Breaker Principles control in all instances. Entergy cites Settlement Agreement section II.D., which states, “[t]he terms and conditions set forth in the Breaker Principles shall control in the event of any conflict with respect to the implementation of the cost allocation procedures described in this Settlement Agreement.” Section 7 also states, “these cost allocation principles shall be continuously effective through any *Pro Forma* Interconnection and Operating Agreement and Interconnection Procedures that Entergy proposes for a Regional Transmission Organization or Transco in which Entergy is a member.”

13. Entergy claims that the exercise of the reopener provision is inconsistent with Occidental's commitment in section 4 of the Breaker Principles to pay for the Waterford Breaker upgrades on a directly assigned basis. Entergy claims this commitment is inconsistent with Entergy's obligation to give transmission credits to Occidental under a *pro forma* IA. Entergy cites *Duke Energy Hinds* and *Illinois Power Co.*, 99 FERC ¶ 61,164 at P 13 (2002) to support its assertion that network facilities that are eligible for transmission credits cannot be directly assigned to the transmission customer.

## 3. Commission Determination

14. The Commission continues to agree with the ALJ that the inclusion of the reopener provision in the Settlement Agreement can only logically be read to provide Occidental with an alternative approach to interconnection and operation terms and conditions. The reopener provision is not at odds with the Breaker Principles because once Occidental uses the reopener provision, the Breaker Principles are void. The Commission finds that Occidental can use this provision to switch to Entergy Louisiana's Commission-approved *pro forma* IA. Our review of the Initial Decision shows that the ALJ carefully analyzed all available evidence regarding the inclusion of the reopener provision in the Settlement Taft IA and the relationship between this provision and the Breaker Principles.

15. The Commission agrees with the ALJ that while the Principles assign the initial cost responsibility for the Breaker Upgrades, they are silent on the issue of Entergy providing transmission credits. We agree with the ALJ's assertion that the Breaker Principles' initial cost allocation is different from the issue of Entergy providing transmission credits. The Commission finds that the reopener provision trumps the Breaker Principles.

## **Extrinsic Evidence**

### **1. Administrative Law Judge Decision**

16. The ALJ held that Occidental intended to include the reopener provision in the Settlement Taft IA. The ALJ found that the evidence did not support a finding that the parties inadvertently included the reopener provision in the Settlement Taft IA. He concluded that even if Entergy Louisiana did not mean to include the reopener provision, it clearly made a mistake by signing a settlement agreement that contained the provision.

### **2. Entergy's Arguments**

17. Entergy claims that the reopener provision is ambiguous on its face and therefore the ALJ should have reviewed extrinsic evidence to deduce the parties' true intent. Although Entergy admits that when construing contracts or settlement agreements, a court is required to interpret them "in accordance with the expressed intentions of the parties,"<sup>9</sup> it asserts that when there is ambiguity as to intent the court should go with the more clearly expressed intent. Specifically, Entergy claims that ambiguity in this case led to the Commission setting it for hearing.

18. Entergy also argues that a subsequent contract between the same parties that addresses the same subject matter "rescinds, supercedes, and is substituted for the earlier contract,"<sup>10</sup> when the provisions cannot exist together. Entergy cites cases where a contract term that is inconsistent with a term from a previous contract between the same parties on the same subject matter rescinds the inconsistent term in an earlier contract.<sup>11</sup>

### **3. Commission Determination**

19. The Commission disagrees with Entergy's assertions that the ALJ failed to evaluate extrinsic evidence to determine the parties' intent regarding the inclusion of the reopener provision and, therefore, did not follow the Commission's mandate. The Commission finds that the ALJ conducted a trial-type evidentiary hearing complete with witnesses, cross-examination, and questioning by the ALJ himself. The Initial Decision shows that the ALJ carefully examined evidence regarding the parties' intent and made a thoughtful decision. The Commission finds that Entergy's argument that the ALJ failed to consider important extrinsic evidence presented during the hearing is without merit.

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<sup>9</sup> *Antonio Mastrobuona, et al., v. Shearson Lehman Hutton, Inc., et al.*, 514 U.S. 52, 57, 66 (1995).

<sup>10</sup> *Housekeeper Pub. Co. v. Swift, et al.*, 97 F. 290 (8<sup>th</sup> Cir. 1899).

<sup>11</sup> *See Nat'l R.R. Passenger Corp. v. Expresstrak, L.L.C.*, 330 F.3<sup>rd</sup> 523, 530 (D.C. Cir. 2003). *See also Egan v. McNamara*, 467 A.2d 733, 740 (D.C. 1983).

In paragraphs 41 through 63 of the Initial Decision, the ALJ carefully evaluated evidence presented by both parties at the hearing. The ALJ did not find Entergy's evidence compelling and neither does the Commission.

20. The Initial Decision weighs all the evidence in this proceeding and finds that Entergy wrongly claimed that the Breaker Principles would forever control in any conflict with the Settlement Agreement. Instead, we agree with the ALJ that the reopener provision provides an alternative to the Breaker Principles. When and if Occidental exercises its rights under the reopener provision, then it would completely replace the Breaker Principles with the current Entergy *pro forma* IA.<sup>12</sup> The ALJ correctly asserts that this is the only way to “interpret the interplay between these documents and give recognition to each of the relevant provisions in the agreements.”<sup>13</sup>

21. We do not accept Entergy's logic that the reopener provision is really just part of some separate, earlier contract provision that was accidentally included in the Settlement Taft IA and therefore should be given no weight in our interpretation of this settlement agreement. Hearing evidence shows that Entergy included this reopener provision or similar language in 28 other agreements around the time of this case.<sup>14</sup> The Commission finds that Entergy knew or should have known that the reopener provision was included in the Settlement Taft IA. The Commission finds that the reopener provision is an integral part of the Settlement Taft IA.

## **B. Timing of the *Pro Forma* IA and the Original TAFT IA**

### **1. Administrative Law Judge Decision**

22. The ALJ found support for rendering the reopener provision remains effective in that there were only eight days between Commission acceptance of Entergy's initial *pro forma* IA on May 18, 2000 and the filing of the Original Taft IA on May 26, 2000.<sup>15</sup> The ALJ noted that it would have been pointless to include the option to elect the *pro forma* IA in the Settlement Taft IA if Occidental had that option already.<sup>16</sup> The ALJ stated that “the very strong inference to be drawn from these facts is that this section was to confer upon Occidental broader options than to elect the specific Entergy *Pro Forma* IOA that was otherwise available to it.”<sup>17</sup>

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<sup>12</sup> Initial Decision at P 56.

<sup>13</sup> *Id.* at P 56.

<sup>14</sup> *Id.* at P 32.

<sup>15</sup> *Id.* at P 40.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

## 2. Entergy's Arguments

23. Entergy argues that the ALJ was wrong in drawing the inference based on the eight-day time gap. Entergy claims that the eight-day gap between issuance of the May 18 order and the filing of the Original Taft IA reflects nothing more than an administrative issue relating to the final preparation and submittal of the Section 205 filing necessary to implement the Taft facility's interconnection. Entergy claims that the negotiations regarding the reopener provision were completed long before the May 18 order. Entergy states that the timing of the May 18 order was beyond the control of the parties.

24. Entergy claims the ALJ ignored testimony that Occidental's request to file an unexecuted version of the Original Taft IA would have been received sometime during the 30 days preceding the actual May 26 filing of the agreement. If Entergy had tried to use the May 18 order to renegotiate the Original Taft IA then it would most likely have violated the OATT requirement that it submit a contested service agreement to the Commission within 30 days of a customer's request. Entergy asserts that the Initial Decision P 40 wrongly refers to the Original Taft IA, which was filed unexecuted, as being signed by Entergy.

## 3. Commission Determination

25. The Commission disagrees with Entergy's assertions regarding the ALJ's finding of a "strong inference" between the close filing dates of the *pro forma* IA and the Original Taft IA. Entergy advances numerous arguments against the ALJ's findings based on the close filing dates of these documents. The *pro forma* IA and the Original Taft IA were both the subject of serious negotiations. These agreements were interrelated through the inclusion of the reopener provision in the Original Taft IA. As a result, we agree with the ALJ's drawing of a strong inference from the close-in-time filing of the two agreements. Entergy's claim that the negotiations regarding the reopener provision were completed long before the May 18 order buttresses the ALJ's finding that Occidental can invoke the reopener provision here. During negotiations the parties must have contemplated that the Commission might accept the *pro forma* IA, thereby satisfying the preconditions (that Entergy "files a Pro Forma [IA] which is accepted for filing by FERC") necessary for Occidental to be able to invoke the reopener provision. Entergy had every opportunity during these negotiations to include clearly delineated limits in the reopener provision to restrict the version of the *pro forma* IA that Occidental could elect.

26. Even if we were to agree with Entergy's convoluted arguments, the parties' inclusion of the reopener provision in the Settlement Taft IA counteracts its attempts to dispel the connection between the *pro forma* IA and the Original Taft IA. Entergy had another bite at the apple to remove the reopener provision when it negotiated the

Settlement Taft IA. Not only did it fail to remove this provision, but it signed the Settlement Taft IA.

**C. Absence of Reopener Provision in Convent IA**

**1. Administrative Law Judge Decision**

27. The ALJ found Occidental's arguments concerning the devolving interests of Occidental in the Convent facility persuasive as to why the parties did not include the reopener provision in either the Original Convent IA or the Settlement Convent IA.<sup>18</sup> Mr. Marone, Occidental's witness, began the Original Convent IA negotiations on behalf of Occidental, but then turned the project over to EWO, a subsidiary of Entergy, in order to find a buyer for the project.<sup>19</sup>

28. The ALJ stated, "While Entergy argues that Occidental pursued other favorable terms for the Convent IOA, it nevertheless would be a considerable stretch to derive from these Convent IOA facts a specific meaning for the words in Section 23.8 of the Taft agreement."<sup>20</sup> The ALJ did not find Entergy's arguments concerning the absence of the reopener provision from the Original Convent IA relevant. He buttressed this statement by noting the inclusion of a same or similar reopener provision in 28 other Entergy IAs.<sup>21</sup>

**2. Entergy's Arguments**

29. Entergy argues that the absence of the reopener provision from the Original Convent IA and Settlement Convent IA is very telling, given Occidental's assertion that the reopener provision was a significant provision in its Original Taft IA. Entergy claims that it is strange that the parties would intentionally include the reopener provision in the Settlement Taft IA but leave it out of the Settlement Convent IA.

30. Entergy then focuses on Occidental's argument at the hearing that Occidental did not care about the Convent Facility despite having negotiated and executed the Settlement Convent IA. Entergy criticizes the ALJ's reliance on what it calls the "could care less" argument. Entergy also notes that Occidental's protests about tax gross-up provisions in both the Original Taft IA and the Original Convent IA are at odds with the assertions of Mr. Marone, Occidental's witness, that Occidental did not care about the Convent facility.

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<sup>18</sup> *Id.* at P 39.

<sup>19</sup> Tr. at 164 - 166.

<sup>20</sup> Initial Decision at P 39.

<sup>21</sup> *Id.*

### 3. Commission Determination

31. The Commission agrees with the ALJ's finding concerning the parties' failure to include the reopener provision in the Original Convent IA or Settlement Convent IA. In his hearing testimony, Mr. Marone stated, "By September, I was really maintaining those two interests for Occidental and kind of acting as an intermediate for EWO and Entergy. It was no longer my money that was at stake."<sup>22</sup> We believe that it was natural for Occidental to fight harder to include the reopener provision in the Settlement Taft IA, which affects a facility still in its control and is therefore in the company's interest, than to fight for the same provision in the Settlement Convent IA, which concerns a facility that Occidental had already turned over to EWO.

32. While Entergy makes much of the modifications made to the tax language in the Original Convent IA and the Settlement Convent IA, the Commission does not agree that the record supports Entergy's claims. The parties included a provision in the Original Convent IA, filed on September 14, 2000, under which Occidental was permitted to ask Entergy to file a private letter ruling request with the Internal Revenue Service to discover the taxable nature of payments made by Occidental under that agreement.<sup>23</sup> The Settlement Convent IA includes modifications agreed to by the parties. However, Entergy includes no testimony or evidence that demonstrates the negotiations for these changes. Nor did Entergy cross examine Occidental's witness at the hearing regarding the reason for these changes. Thus, the ALJ was justified in his assertion: "While Entergy argues that Occidental pursued other favorable terms for the Convent IOA, it nevertheless would be a considerable stretch to derive from these Convent IOA facts a specific meaning for words in Section 23.8 of the Taft Agreement."<sup>24</sup>

#### D. Discussion of the three Pro Forma IA Filings

##### 1. Administrative Law Judge Decision

33. The ALJ noted the difficulty that Entergy had in pinning down which *pro forma* IA the reopener provision allowed Occidental to execute under Entergy's theory of intent.

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<sup>22</sup> Tr. at 165:24 - 166:2. Mr. Marone noted, "Our main concern at that point was to maintain the queue position so if a developer came along, I would have a queue position for them and not stick them at the end of the line. And the other interest was to disconnect the two. Entergy had made one predicated on the other. In order to be able to hand over an interconnection agreement that had some value to a developer, I didn't want to make it predicated on some actions that Occidental would or would not take in Taft." Tr. at 164:9-17.

<sup>23</sup> Exh. No. ETR-4 at 62, 66, 68-69.

<sup>24</sup> Initial Decision at P 39.

The ALJ noted that the *pro forma* IA has been a work in progress with several versions, the latest of which was accepted in final form on October 10, 2002.<sup>25</sup> “At various times in this proceeding, Entergy has identified the *Pro Forma* IOA initially accepted for filing on May 18, 2000, the IOA submitted in the June 19, 2000 compliance filing, and the IOA accepted and modified in Docket No. ER00-1743, as the *Pro Forma* IOA available to Occidental under its theory of the intent of Section 23.8.”<sup>26</sup> The ALJ agreed with Trial Staff and Occidental that these *pro forma* IAs are not the same because each has been modified as required by the Commission.

## 2. Entergy’s Arguments

34. Entergy claims that the ALJ’s assertion that there were three different versions of the *pro forma* IA<sup>27</sup> is incorrect. Instead, Entergy states that the “version accepted, as modified, on May 18, 2000, which was then codified in the June 19 Compliance Filing, was also the same version accepted and modified in Docket No. ER00-1743.”<sup>28</sup>

## 3. Commission Determination

35. The Commission disagrees with Entergy’s assertions that the three *pro forma* IAs are the same version. On May 18, 2000, the Commission issued an order accepting Entergy’s initial filing of a *pro forma* IA and ordering it to make modifications. Entergy then changed the *pro forma* IA that the Commission accepted on May 18, 2000 and filed its modified *pro forma* IA with the Commission on June 19, 2000. The *pro forma* IAs that the Commission accepted for filing on May 18 and June 19 are different versions of Entergy’s *pro forma* IA. Further, the current *pro forma* IA includes additional Commission-required refinements. The Commission disagrees with Entergy’s arguments, and finds that the three *pro forma* IAs reflect a continuing progression of changes.

36. The Commission agrees with the ALJ that the reopener provision contains no time limit. As a result, both the ALJ and we have determined that the reopener provision is not limited by time or to any one Entergy *pro forma* IA in particular. Accordingly,

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<sup>25</sup> *Id.* at P 36.

<sup>26</sup> *Id.* at N 6.

<sup>27</sup> Entergy states that the Initial Decision wrongly found that there were three different versions of the *pro forma* IA including (a) version accepted for filing on May 18, 2000; (b) the version submitted in Entergy’s June 19, 2000 compliance filing; and (c) the version accepted, as modified, in Docket No. ER00-1743.

<sup>28</sup> Request for Rehearing of Entergy Services, Inc., Jan 21, 2005, at 40.

whether there was one or three Entergy IAs, once a *pro forma* IA is accepted by the Commission, the reopener provision applies to it.

The Commission orders:

Entergy's request for rehearing is denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.